(1) ne Court, U.S.
I L E D

No. 991 624 APR 0 7 2000

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In The
Supreme Court Of The United States

ATC PARTNERSHIP,
Petitioner

v.

TOWN OF WINDHAM, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Did the petitioner state a legally sufficient cause of action under 42 U.S.C. § 1983 arising out of a deprivation of its Fourteen Amendment right to substantive due process of law where its complaint alleges that local governmental agencies and their agents intentionally interfered with the petitioner's possession, use and enjoyment of its real and personal property through outrageous tactics which included, but were not limited to, the illegal and improper use of a tax warrant and the posting of police officers at the petitioner's property to intimidate the petitioner, all in order to deprive the petitioner of access to and use of its real and personal property *prior* to the time that its real property was taken by eminent domain?

LIST OF PARTIES

Plaintiff (Petitioner):

ATC Partnership

Defendants (Respondents):

Town of Windham
Walter M. Pawelkiewicz
George E. Barton
Hanna K. Clements
Joseph S. Marsalisi
John J. McGrath, Jr.
Yolanda Negron
Charlotte S. Patros
C. Lawrence Schiller
Sam Shifrin
Sebastian Ternullo
Thomas W. White
Linda B. Theriault
Milton King
Paul DeCadi
Northeast Connecticut Economic Alliance, Inc.
Geri W. Langlois
Gail O. Mellow
Giacomo J. Guarnaccia, Jr.
Betti Kuszaj
Timothy W. McNally
Robert E. Miller
Demetrios Pachis
James A. Weiss
Donald E. Williams

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PETITION FOR WRIT OF CERTIORARI

ATC Partnership respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Connecticut Supreme Court entered in this case on December 14, 1999 (reargument denied January 19, 2000), in order to address the important issues of federal constitutional law presented herein that have not been, but should be, settled by this Court and because the Connecticut Supreme Court has decided such important issues of federal constitutional law in a way that conflicts with the decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Supreme Court that gives rise to this petition is *ATC Partnership v. Town of Windham*, 251 Conn. 597, 741 A.2d 305 (1999). That opinion is reprinted in the Appendix (pages A1-A21). By order dated January 19, 2000, the Connecticut Supreme Court denied the petitioner's motion for reargument or reconsideration. That order is reprinted in the Appendix (page A22).

JURISDICTION

In an opinion released on December 14, 1999, the Connecticut Supreme Court affirmed the judgment of the trial court. On January 19, 2000, the Connecticut Supreme Court denied the petitioner's timely motion for reargument or reconsideration. Pursuant to Supreme Court Rule 13.1 and 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 in that the case turns on the rights claimed by the petitioner under the Constitution and a statute of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions are involved in this case are 42 U.S.C. § 1983; and the Fourteenth Amendment (Section 1), the Fifth Amendment and the Fourth Amendment to the United States Constitution. The verbatim text of each provision is set forth in the Appendix (pages A23-A24).

STATEMENT OF THE CASE

In this action, the petitioner alleges that it was the victim of outrageous tactics used by local government agencies and their agents, which actions were intended to, and did, interfere with the petitioner's possession, use and enjoyment of its real and personal property located in Windham, Connecticut. Such tactics included, but were not limited to, the illegal and improper use of a tax warrant to interfere with the petitioner's property rights and the posting of police officers at the petitioner's property to intimidate the petitioner, all in order to deprive the petitioner of access to and use of its real and personal property *prior* to the time that its real property was taken by eminent domain.

The petitioner therefore seeks damages pursuant to 42 U.S.C. § 1983 for the deprivation of its constitutional rights occurring prior to and in the course of the condemnation of its real property. In this case, the petitioner does not challenge the taking of its property since the value of the property taken by the respondents appears to be adequately protected through other, state law procedures (e.g., a condemnation appeal and a conversion action). Rather, at issue in this case is

whether the manner and the means employed by the respondents *prior to* effecting that taking of property deprived the petitioner of its right to substantive due process under the Fourteenth Amendment to the United States Constitution.

The trial court determined that the petitioner's factual allegations were insufficient to state a legally cognizable claim for relief under § 1983. A judgment in favor of the respondents was therefore rendered at the pleading stage of the case.[1] The Connecticut Supreme Court affirmed the judgment of the trial court.

A. The Allegations of the Third Amended Revised Complaint

Since the judgment in this case was rendered at the pleading stage of the case, all of the operative facts are based on the allegations set forth in the petitioner's Third Amended Revised Complaint (the "Complaint"). The following allegations therefore govern this appeal.

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[1] The petitioner's Third Amended Revised Complaint was stricken pursuant to Connecticut Practice Book § 10-39(a)(1). This procedural disposition is similar to dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

1. The Property and the Parties

At all times relevant hereto, the petitioner was the owner of certain real property located in Windham, Connecticut, commonly known as the American Thread Company complex. Complaint, ¶ 3. Included in the American Thread Company complex owned by the petitioner was extensive personal property belonging to the petitioner. *Id.*, ¶ 3. Respondent Pawelkiewicz was and is the First Selectman of the respondent Town of Windham, and respondents Barton, Clements, Marsalisi, McGrath, Negron, Patros, Schiller, Shifrin, Ternullo, and White are Selectmen of the respondent Town of Windham. *Id.*, ¶ 4-5. (These respondents, are hereinafter collectively referred to as "selectpersons.") Respondents Langlois, Mellow, Guarnaccia, Kuszaj, McNally, Miller, Pachis, Weiss, and Williams are officers and directors of the respondent Northeast Connecticut Economic Alliance, Inc., a local economic development agency. *Id.*, ¶ 6. (These respondents are hereinafter collectively referred to as "members of said Alliance.") Respondent Theriault is the Tax Collector of the respondent Town of Windham. *Id.*, ¶ 7. Respondent King is

the Chief of Police of the respondent Town of Windham, and respondent DeCadi is a Lieutenant of the Town of Windham Police Department. *Id.*, ¶ 8-9.

2. The Respondents' Conduct

The complaint alleges efforts by the respondents, over an extended period of time, to negotiate with the petitioner, as joint venture partners of the town or its agent, in regard to an economic development project. *Id.*, ¶ 11. These efforts by the respondents, however, were undertaken in bad faith and through misrepresentation as to the respondents' true intentions. *Id.*, ¶¶ 12-13. The respondents plotted, planned and conspired to usurp the economic development of said project, as well as the personal property located therein, and to confiscate same by whatever means were expedient to accomplish that purpose. *Id.*, ¶ 12. In furtherance of their conspiracy to take the petitioner's property and cause the petitioner financial havoc, the respondents Town of Windham and Northeast Connecticut Economic Alliance, through their agents, sought to coerce the petitioner by demanding that it accede to an ultimatum which would have allowed the respondents to obtain the petitioner's property at a fraction of

its value. *Id.*, ¶¶ 12-14. The respondents, pursuant to that conspiracy, then deprived the petitioner of possession, enjoyment and use of its real and personal property acting under color of law, and in doing so acted willfully, arbitrarily and capriciously and in violation of the laws, rights and immunities afforded to the petitioner pursuant to law. *Id.*, ¶ 15. With the intent to interfere with, intimidate and deprive the petitioner of possession of its real and personal property, the respondent selectpersons of the Town of Windham and the respondent members of the Northeast Connecticut Economic Alliance, Inc. sought to and did cause the petitioner to be deprived of the use, enjoyment and possession of its real and personal property. *Id.*, ¶ 16.

In furtherance of that deprivation, said respondents caused the Windham Tax Collector (respondent Theriault) to wrongfully issue an alias tax warrant in regard to personal property and, together with said Tax Collector and other respondents acting in concert, used such tax warrant for the improper purpose of confiscating the petitioner's personal property. *Id.*, ¶ 17-19. Specifically, certain of the respondents purposefully interfered with the petitioner's property rights

through the illegal and improper use of an alias tax warrant. *Id.*, ¶ 18. In furtherance of said deprivation, said respondents then utilized town police officials (including respondents King and DeCadi) to intimidate the petitioner from exercising its lawful rights over both its real and personal property and to carry out the willful, arbitrary and capricious actions of the respondents in seeking to gain possession and control over the petitioner's property in carrying out said conspiracy, including the posting of police officers and/or others acting in concert therewith, to prevent and preclude the petitioner from having access to its property. *Id.*, ¶ 19.

These actions by the respondents are alleged to have been committed under color of right and under color of state law; *Id.*, ¶ 2; and to have constituted a gross abuse of governmental power, a deprivation of the petitioner's property based on indefensible reasons, a use of governmental power for purposes of oppression, and arbitrary governmental conduct which shocks the conscience, all of which have deprived the petitioner of its constitutional right to substantive due process of law. *Id.*, ¶ 1, 20. Finally, the petitioner alleges that it has been injured as a result of the aforementioned willful, arbitrary

and capricious acts of the respondents. *Id.*, ¶ 2, 21.

The First Count of the petitioner's Complaint seeks damages pursuant to 42 U.S.C. § 1983 based on a violation of the petitioner's federal constitutional right to substantive due process of law.[2]

B. The Connecticut Supreme Court Decision

The Connecticut Supreme Court relied on two grounds to support its conclusion that the allegations of the Complaint failed to set forth a legally sufficient claim for the deprivation of the petitioner's right to substantive due process.

First, the Court concluded that "the conduct of which the [petitioner] complains does not meet the mandated constitutional standard of the kind of misuse of governmental authority that is encompassed within cognizable claims of the denial of substantive due process." Appendix, p. A11. Thus, the Court, comparing the facts here to the stomach pumping

[2] The Second Count of the Complaint sought damages directly under the Connecticut constitution. The Connecticut Supreme Court concluded that the petitioner failed to state a legally sufficient cause of action in the Second Count as well. However, since the Second Count does not present an issue of federal law (but only one involving the interpretation of state law), the disposition of that Second Count by the Connecticut Supreme Court is not the subject of this Petition.

of *Rochin v. California*, 342 U.S. 165, 72 S.Ct.205, 96 L.Ed. 183 (1952); the attempted regulation of personal decisions regarding marriage or contraception of *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and, in particular, "the type of governmental conduct that resulted in a death in . . . *County of Sacramento [v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)]"; concluded that "the type of economic harm alleged in the [petitioner's] complaint fails to rise to the conscience shocking level that the United States Supreme Court has set as the standard for violations of substantive due process." Appendix, A13 (footnote omitted).

Second, the Court, relying on *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), concluded that because different aspects of the petitioner's claims are purportedly covered by two specific constitutional provisions, namely, the Fourth Amendment and the Fifth Amendment, then those specific constitutional provisions preclude the petitioner from relying on the more generalized concept of substantive due process in any challenge to the

type of governmental misconduct alleged by the petitioner. Appendix, pp. A14 to A15.

REASONS FOR GRANTING THE WRIT

Numerous decisions by this Court "have held the provision that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,' U.S. Const., Amdt. 14, § 1, to guarante[e] more than fair process . . . and to cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 1713, 140 L.Ed.2d 1043 (1998), citing *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997), and *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986). This Court has stated that "the Due Process Clause was intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression." *County of Sacramento*, 523

U.S. at 846, 118 S.Ct. at 1716 (quotation marks omitted; citations omitted). Thus,

> for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. . . . [T]he substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. While the measure of what is conscience-shocking is no calibrated yard stick, it does . . . point the way.

Id., 523 U.S. at 846-47, 118 S.Ct. at 1717 (quotation marks omitted; citations omitted). The substantive component of the Due Process Clause therefore protects against government deprivation of property based on "indefensible reasons"; *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988); the use of governmental power "for purposes of oppression"; *Daniels*, 474 U.S. at 331, 106 S.Ct. at 665; *Searles v. SEPTA*, 990 F.2d 789, 790-91 n.2 (3rd Cir. 1993); and arbitrary governmental conduct which "shocks the conscience"; *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208 96 L.Ed. 183 (1952); *Roesch v. Otarola*, 980 F.2d 850, 854 (2d Cir. 1992); all of which identify any gross

abuse of governmental power as outside of constitutional bounds. Substantive due process, then, delineates "an outer limit on the legitimacy of governmental action" which proscribes "conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999).

Accordingly, substantive due process claims, at their core, seek redress for willful, arbitrary and capricious governmental acts that "may not take place no matter what procedural protections accompany them." *Hudson v. Palmer*, 468 U.S. 517, 541 n.4, 104 S.Ct. 3194, 3208 n. 4, 82 L.Ed.2d 393 (1984) (Stevens, J., concurring); see also *County of Sacramento*, 523 U.S. at 846, 118 S.Ct. at 1716 ("due process protection in the substantive sense limits what the government may do"). In other words, certain government actions are prohibited as a matter of constitutional law because they violate the decencies of civilized conduct and interfere with rights implicit in the concept of ordered liberty. *Id.*, 523 U.S. at 846-47, 118 S.Ct. at

1717.

1. The Connecticut Supreme Court Improperly Applied *County of Sacramento v. Lewis* and Failed to Properly Recognize that the Petitioner's Allegations of Intentional, Arbitrary and Abusive Governmental Conduct Set Forth a Cognizable Substantive Due Process Claim.

Here, the Complaint alleges efforts by the respondents, over an extended period of time, to negotiate with the petitioner, as joint venture partners, in regard to an economic development project. The Complaint further alleges, however, that these efforts by the respondents were undertaken in bad faith and through misrepresentation as to the respondents' true intentions, and that the respondents plotted, planned and conspired to usurp the economic development of said project, as well as the personal property located therein, and to confiscate the same by whatever means were expedient to accomplish that purpose. In furtherance of their plan to take the petitioner's property and cause it financial havoc, the respondents sought to coerce the petitioner by demanding that it accede to an ultimatum which would have allowed the respondents to obtain the petitioner's property at a fraction of

its value. These allegations, while not independently the basis of any constitutional claim, establish the respondents' state of mind as willful and intentional, thus distinguishing this case from the type of conduct at issue in *County of Sacramento*, 523 U.S. at 853-55, 118 S.Ct. at 1720-21 (holding that, because no "harmful purpose" was shown, no substantive due process claim stated where high speed chase by police causes the plaintiff suspect's death).

With this as background, the Complaint alleges that, in furtherance of said conspiracy to cause economic harm to the petitioner, the respondents caused the Windham Tax Collector to wrongfully levy upon the petitioner's personal property based on an improperly assessed tax. Specifically, said respondents purposefully interfered with the petitioner's property rights through the illegal and improper use of an alias tax warrant. The respondents then utilized town police officials to intimidate the petitioner from exercising its lawful rights over both its real and personal property prior to the taking of the real property by eminent domain for the purpose of carrying out the willful, arbitrary and capricious actions of the respondents in seeking to gain possession and control over

the petitioner's property, including the posting of police officers, and others acting in concert therewith, to prevent and preclude the petitioner from having access to its real and personal property.

These allegations of bad faith and the artificial creation of tax liability, a planned seizure of property in excess of statutory authority, and the use of police presence to intimidate the petitioner in the course of a carefully orchestrated scheme to interfere with the petitioner's possessory and development rights in its property, taken together, state a claim of an abuse of governmental power so egregious that it must shock the conscience and so egregious that it should not be tolerated in a civilized society. *Cf. DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 597-601 (3rd Cir.), *cert. denied*, 516 U.S. 937, 116 S.Ct 352, 133 L.Ed.2d 247 (1995) (substantive due process claim based on arbitrary or irrational decision by local zoning authority to deny variance); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1408-10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990)(substantive due process violation where defendant

officials breached a dam and destroyed a lake when the officials knew or should have been aware that such action was unnecessary and shrouded their decision in a veil of secrecy and deception wholly unjustified by the situation); *Bello v. Walker*, 840 F.2d 1124, 1128-30 (3d Cir.), *cert. denied*, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 107, *cert. denied*, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988) (interference with municipal land use permit process for partisan political or personal reasons unrelated to merits of permit application sufficient to establish substantive due process violation); *TLC Development, Inc. v. Town of Branford*, 855 F. Supp. 555, 557-58 (D. Conn. 1994) (substantive due process violation where town denied site plan approval based on considerations which the law did not permit); *L.A. Ray Realty v. Town Council of the Town of Cumberland*, 698 A.2d 202, 211-13 (R.I. 1997) (substantive due process violation where town officials distributed falsified ordinance to local planning and zoning commission and advised commission to act contrary to court order in hearings before the commission, resulting in denial of subdivision approval).

It is well recognized that "the fourteenth amendment's due process clause protects property no less

than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints." *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1408-09. In the *Sinaloa Lake Owners Ass'n* case, government officials purposefully breached a dam at a time when high waters had receded and no emergency existed and shrouded their decision in a veil of secrecy and deception wholly unjustified by the situation. *Id.*, 1400-01, 1408. There, the Ninth Circuit observed that

> [a] government entity's police and eminent domain powers go far beyond crisis management; the city certainly has the power to protect its citizens by breaching a dam it considers potentially, though perhaps not imminently, dangerous. But government power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm.

Id., 1408. Thus, the *Sinaloa Lake Owners Ass'n* court

> conclude[d] that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent

> plaintiffs from taking advantage of available legal processes. This claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them.

Id., 1410.[3]

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[3] In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit, relying on *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), appears to have refined its *Sinaloa* analysis, concluding that no substantive due process claim arises from the taking of property where such a claim can be brought under the Takings Clause. *Armendariz*, 75 F.3d at 1324-36. However, as will be argued in more detail in the next section of this Petition, this Court has subsequently recognized that *Graham* should not be read in so broad a fashion: "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento*, 523 U.S. at 843, 118 S.Ct. at 1715, quoting *United States v. Lanier*, 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 1228 n.7, 137 L.Ed.2d 432 (1997).

However, the claim here is not one of a public taking without just compensation -- a claim which would be firmly rooted in the Takings Clause; rather, the petitioner's claim here challenges the respondents' arbitrary and oppressive conduct (independent of any compensation paid for the property taken). To allow *Graham* to preclude such a substantive due process claim would render nugatory the following observation of the Eleventh Circuit, which cogently distinguished between a substantive due process claim arising out of the taking of property and a just compensation claim arising out of the taking: "if a governmental entity has acted arbitrarily and capriciously . . . in the course of eminent domain proceedings, the fact that just compensation is paid would not undo the arbitrary act, nor cure the constitutional violation." *Eide v. Sarasota County*, 908 F.2d 716, 722 n. 10 (11th Cir. 1990); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n.8 (11th Cir.

Likewise, in the present case, the petitioner's claim challenges the manner and the methods employed by the respondents in carrying out their decision to take certain real property through the lawful process of eminent domain. Rather than simply using their powers of eminent domain, the Complaint alleges that the respondents purposefully interfered with the petitioner's property rights *prior* to the taking by acting in an abusive, irrational and malicious fashion for no other reason than to cause injury to the petitioner beyond that which might have normally accompanied the later taking of their real property. As in the *Sinaloa Lake Owners Ass'n* case, the petitioner's claim here "goes beyond the taking of

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1989) ("A property owner has been denied substantive due process . . . the moment a government decision affecting his property has been made in an arbitrary and capricious manner, regardless of whether he is later compensated for that violation."). This analysis, moreover, is entirely consistent with the Ninth Circuit's conclusion in *Sinaloa* that the substantive due process claim there was viable since it went "beyond the taking of plaintiffs' property" when the "plaintiffs also claim[ed] that government officials abused the legitimate police powers entrusted to them." *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1410.

Consequently, these reasons and for the additional reasons set forth in the next section of this Petition, neither *Graham v. Connor* nor *Armendariz v. Penman* is applicable to the circumstances of this case.

plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them." *Id.*

The Connecticut Supreme Court, however, incorrectly applied this Court's teaching in *County of Sacramento v. Lewis* to conclude that the governmental conduct alleged in this case "fails to rise to the conscience shocking level that the United States Supreme Court has set as the standard for violations of substantive due process." Appendix, p. A13. In *County of Sacramento*, the analysis of the substantive due process claim turned on the fact that there was no intentional misuse of police power; 523 U.S. at 854-55, 118 S.Ct. at 1720-21; and there was no claim that the exercise of such power was tainted by an improper or malicious motive. *Id.* **By contrast, both are present here.** The governmental misconduct here, which by its very nature was wholly arbitrary and irrational, necessarily rises to the conscience shocking level which has been articulated by this Court because of its **intentional** and **unquestionably wrongful** nature. *See* Krotoszynski, Fundamental Property Rights, 85 Georgetown Law Journal 555, 571 (1997) ("When, however, the conduct is wholly

irrational and arbitrary -- for example, when it is both intentional and unquestionably wrongful -- a would-be plaintiff should be permitted to bring a substantive due process challenge.").

Under these circumstances, the Connecticut Supreme Court should have concluded that the petitioner had alleged sufficient facts to support a claimed violation of its constitutional right to substantive due process of law, which constitutional violation will support a claim for damages under 42 U.S.C. § 1983.

2. Because the Petitioner's Substantive Due Process Claim Is Not "Covered By" Other Constitutional Provisions, the Connecticut Supreme Court Improperly Applied *Graham v. Connor* to the Circumstances of this Case.

The Connecticut Supreme Court also prevented the petitioner from relying on substantive due process protections because, according to the Connecticut Supreme Court, such a claim is precluded where "two specific constitutional provisions, the fourth and fifth amendments . . . provide 'explicit textual source[s] of constitutional protection' against the type of governmental misconduct alleged in the

[petitioner's] complaint." Appendix, p. A15, citing *Graham* v. *Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Connecticut Supreme Court reasoned: "If the [respondents'] seizure of the [petitioner's] property prior to condemnation was illegal, then it may be actionable under the fourth amendment; if the condemnation itself was improper, then it may be actionable under the takings clause. In any event, the facts of this case do not warrant our departure from the analytical framework set forth by the United States Supreme Court in *Graham*." Appendix, p. A15. The doctrine of *Graham v. Connor*, however, is inapplicable to the circumstances of this case, and its application here conflicts with the more recent application of that doctrine by this Court in *County of Sacramento v. Lewis*.

First of all, in *Graham*, this Court held that "[w]here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento*, 523 U.S. at 842, 118 S.Ct. at 1714. Here, the Connecticut Supreme Court

did not hold that a particular amendment applied; rather, it concluded that two particular amendments applied, with each affecting discrete aspects (subparts) of the petitioner's constitutional claim. *Graham*, however, has never been expanded to require that a defendant's conduct be divided into discrete subparts for the purpose of requiring a separate analysis under two or more distinct constitutional provisions in order to avoid the necessity of examining the totality of the offending conduct under the more general concept of substantive due process.

Furthermore, contrary to the conclusion of the Connecticut Supreme Court, neither the Takings Clause nor the Fourth Amendment is implicated by the allegations of the Complaint. The conclusion that Fifth Amendment takings clause principles might apply here cannot withstand reasoned analysis. Established case law recognizes that when the government interferes with property rights, there are at least three different constitutional claims which might arise -- a just compensation claim, a procedural due process claim, and a substantive due process claim. *See generally Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir. 1990); *Sinaloa Lake Owners*

Ass'n, 882 F.2d at 1401-10; *Brady*, 863 F.2d at 211-16. Each such constitutional claim has a different theoretical basis, arises from different factual events, and implicates different procedural limitations.

Where a landowner claims that the government action has taken his or her property without just compensation, such a claim is made under the Takings (just compensation) Clause and the property owner's damages are measured by the value of the property taken. *Eide*, 908 F.2d at 720. Furthermore, such a claim is not ripe until the landowner has pursued (and exhausted) the available state procedures to obtain just compensation. *Id.*, 720-21, citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1402.

By contrast, where a plaintiff landowner claims that he or she has been deprived of meaningful notice of or an opportunity for a hearing in regard to the government action affecting his or her property, the claim invokes the procedural protections of the Due Process Clause. *See Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404-06; *Brady*, 863 F.2d at 211. Consistent

with its theoretical basis, the availability of state remedies, such as timely review within the state judicial system, necessarily precludes a finding that the defendants' conduct violated the plaintiff's rights to procedural due process. *Brady*, 863 F.2d at 211.

Finally, numerous cases "have recognized that the due process clause includes a **substantive** component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1407 (emphasis added). In other words, "the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational [government] actions." *Brady*, 863 F.2d at 215; *see also Eide*, 908 F.2d at 721-22 (referring to this kind of claim as an "arbitrary and capricious due process" claim).

Because a substantive due process claim is quite different from a just compensation (Takings Clause) claim; see footnote 3, *supra*; the Connecticut Supreme Court improperly relied on the "fifth amendment" (Takings

Clause) to deprive the petitioner of an opportunity to pursue its substantive due process rights. To prove a violation of the Takings Clause, a plaintiff must prove the taking of property and the lack of compensation. To prove a substantive (or arbitrary and capricious) due process claim, "a plaintiff need only prove that the government has acted arbitrarily and capriciously." *Eide*, 908 F.2d at 722. Thus, as the United States Court of Appeals for the Eleventh Circuit has recognized, a taking of property may give rise to a substantive due process claim based on its manner and motive, but not give rise to a just compensation (takings) claim because the landowner has been paid the value of its property: "if a governmental entity has acted arbitrarily and capriciously . . . in the course of eminent domain proceedings, the fact that just compensation is paid would not undo the arbitrary act, nor cure the constitutional violation." *Id.*, 722 n. 10. For this reason, the Connecticut Supreme Court's reliance on the Takings Clause as an "explicit textual source of constitutional protection" to deprive the petitioner of its substantive due process claim was incorrect.

The Connecticut Supreme Court's reliance on the Fourth Amendment (search and seizure) as another "explicit textual source of constitutional protection" to deprive the petitioner of its substantive due process claim under *Graham v. Connor* was also incorrect, albeit for a different reason. In *County of Sacramento v. Lewis*, this Court recognized that *Graham v. Connor* requires resort to Fourth Amendment analysis "only if the [plaintiff's] claim is 'covered by' the Fourth Amendment." *County of Sacramento v. Lewis*, 523 U.S. at 843, 118 S.Ct. at 1715. "The Fourth Amendment covers only 'searches and seizures,' U.S. Const., Amdt. 4, neither of which took place here." *Id.* The unlawful interference with the petitioner's property rights here, through the artificial creation of tax liability and through the use of police presence to intimidate the petitioner in the course of a carefully orchestrated scheme to interfere with the petitioner's possessory and development rights in its property, is not conduct which implicates the proscription on unreasonable searches and seizures normally associated with the Fourth Amendment and its concern for the proper conduct of law enforcement activities. Thus, as this Court concluded in

United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), where the "purpose and effect" of governmental conduct affecting property rights "go[es] beyond the traditional meaning of search and seizure . . . [such as where] the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself . . . [o]ur cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.*, 510 U.S. at 52, 114 S.Ct. at 502.

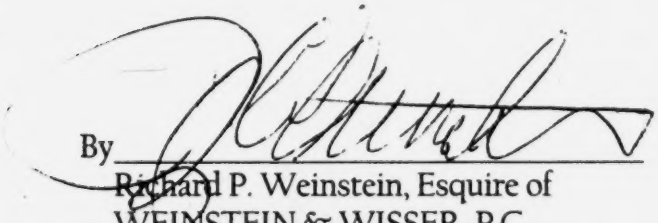
By relying on the Fourth Amendment to preclude substantive due process analysis of the facts of this case, the Connecticut Supreme Court misapplied *Graham* and failed to follow the most recent application of the *Graham* doctrine by this Court in *County of Sacramento*. Therefore, contrary to the conclusion of the Connecticut Supreme Court, the governmental misconduct alleged in the Complaint here is most appropriately analyzed under the rubric of substantive due process, and such analysis should not be precluded by the reach of any other provision of our federal constitution.

CONCLUSION

For all the foregoing reasons, this Petition For A Writ Of Certiorari to the Supreme Court of the State of Connecticut should be granted.

RESPECTFULLY SUBMITTED,

PETITIONER,
ATC PARTNERSHIP



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No. _____

In The
Supreme Court Of The United States

ATC PARTNERSHIP,
Petitioner

v.

TOWN OF WINDHAM, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

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Provisions Involved A23

not material within the meaning of *Brady* because it was available to the defendant through other, independent sources. The defendant, through his counsel, was free to contact Miller and question him regarding his opinion of the defendant's mental condition. There is no suggestion in the record, and the defendant does not allege, that the state attempted to prevent such contact. Therefore, any failure to disclose fully the contents of the conversations between Satti and Miller does not meet the materiality standard of *Bagley* and *Kyles*.

The judgment is reversed in part and the case is remanded with direction to deny the defendant's motion in limine and for further proceedings according to law.

In this opinion the other justices concurred.

ATC PARTNERSHIP *v.* TOWN OF WINDHAM ET AL. (SC 16173)

Borden, Katz, Palmer, Sullivan and Peters, Js.

Syllabus

The plaintiff property owner sought damages from, among others, the defendant town of Windham for the allegedly wilful, arbitrary and capricious seizure and condemnation of certain of its real and personal property. The plaintiff claimed that the defendants had engaged in conduct that deprived it of its federal constitutional right to substantive due process in violation of 42 U.S.C. § 1983. The plaintiff also alleged a violation of its rights under the state constitution. The trial court granted the defendants' motion to strike both counts of the plaintiff's complaint, and, on motion by the plaintiff, rendered judgment in favor of the defendants, from which the plaintiff appealed. *Held*:

1. The trial court properly struck the plaintiff's claim under 42 U.S.C. § 1983; the governmental conduct alleged in the plaintiff's complaint did not shock the conscience so as to amount to a violation of substantive due process under the standard set by the United States Supreme Court in *County of Sacramento* v. *Lewis* (523 U.S. 833), and, as determined by the trial court, the existence of explicit textual sources of constitutional protection—here, the fourth and fifth amendments—against the type of governmental abuse alleged by the plaintiff foreclosed its substantive due process claim.

2. As determined by the trial court, the allegations in the plaintiff's complaint were insufficient to state a cause of action under the due process clause of the state constitution; the remedies afforded to the plaintiff by the constitutional and statutory law of condemnation, the constitutional law of search and seizure and the common law of replevin and conversion were sufficiently compensatory to obviate the need for judicial recognition of a freestanding tort claim under article first, § 8, of the Connecticut constitution.

Argued November 2—officially released December 14, 1999

Procedural History

Action pursuant to, inter alia, 42 U.S.C. § 1983, to recover damages for the alleged violation of the plaintiff's right to substantive due process under the fourteenth amendment to the federal constitution as a result of the condemnation of certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Beach, J.*, granted the defendants' motions to strike the third amended revised complaint; thereafter, the court granted the plaintiff's motion for judgment and rendered judgment in favor of the defendants, from which the plaintiff appealed. *Affirmed.*

Richard P. Weinstein, with whom was *Nathan A. Schatz*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Michael J. Rose*, for the appellees (named defendant et al.).

Richard S. Cody, with whom were *Lisa Silvestri* and, on the brief, *Ana Navarro*, for the appellees (defendant Northeast Connecticut Economic Alliance, Inc., et al.).

Opinion

PETERS, J. This case concerns the extent to which constitutional principles of substantive due process, under the federal constitution or under our state constitution, permit a property owner to pursue an action for

damages premised on a claim of intentional abuse of a municipality's power of eminent domain. The plaintiff property owner claims that it is entitled to recover for the wilful, arbitrary and capricious seizure and condemnation of its property, in furtherance of a municipality's intent to usurp an opportunity for economic development of the property. The question before us is whether such a claim states a viable cause of action either under 42 U.S.C. § 1983 (§ 1983),[1] or under state constitutional law as articulated in *Binette* v. *Sabo*, 244 Conn. 23, 710 A.2d 688 (1998). We conclude that it does not and, accordingly, we affirm the judgment of the trial court.

The plaintiff, ATC Partnership, filed a two count third amended revised complaint (complaint), alleging that the defendants, the town of Windham and the Northeast Connecticut Economic Alliance, Inc.,[2] had violated the plaintiff's right to substantive due process in the course of seizing and condemning certain real and personal property owned by the plaintiff. The first count of the

[1] Section 1983 of title 42 of the United States Code provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

[2] The complaint also names as defendants certain officials and agents of both the town of Windham and the Northeast Connecticut Economic Alliance, Inc.: Walter Pawelkiewicz, Windham's first selectman; George Barton, Hanna Clements, Joseph Marsalisi, John McGrath, Jr., Yolanda Negron, Charlotte Patros, C. Lawrence Schiller, Sam Shifrin, Sebastian Ternullo and Thomas White, Windham's other selectmen; Geri Langlois, Gail Mellow, Giacomo Guarnaccia, Betti Kuszaj, Timothy McNally, Robert Miller, Dimitrios Pachis, James Weiss and Donald Williams, the officers and directors of the Northeast Connecticut Economic Alliance, Inc.; Linda Theriault, Windham's tax collector; Milton King, Windham's chief of police; and Paul DeCadi, a Windham police lieutenant. For the sake of simplicity, we will follow the practice of the parties and refer throughout this opinion to the town of Windham and the Northeast Connecticut Economic Alliance, Inc., as the defendants.

complaint claimed a violation of § 1983, and the second count claimed a violation of the plaintiff's rights under the state constitution. The trial court, *Beach, J.*, granted the defendants' motion to strike both counts of the plaintiff's complaint. Thereafter, the trial court granted the plaintiff's motion for judgment, and subsequently rendered judgment in favor of the defendants. The plaintiff appealed from that judgment to the Appellate Court, and we transferred the case to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The plaintiff's complaint contains the following factual allegations in support of its claim that the defendants had engaged in conduct that constituted a "gross abuse of governmental power . . . for purposes of oppression . . . which ha[s] deprived the plaintiff of its substantive constitutional right to due process of law." The plaintiff was the owner of the American Thread Complex (complex), a piece of real property located in Windham. The complex premises also housed extensive personal property belonging to the plaintiff. On or about August 12, 1994, the defendants acted to condemn the complex, for the purpose of an ongoing economic redevelopment in northeastern Connecticut.[3]

Prior to the condemnation, the plaintiff and the defendants had engaged in extensive, lengthy and unsuccessful negotiations for the sale of the complex to the defendants for the aforementioned economic redevelopment. The plaintiff alleged that, although it had "engaged at all times in good faith negotiations," the defendants had "plotted, planned and conspired to usurp the economic development of said project as well as the personal property located therein and to confiscate same by whatever means were expedient to

[3] The condemnation is the subject of a separate action currently pending in the Superior Court in the judicial district of Windham. *Northeast Connecticut Economic Alliance, Inc.* v. *ATC Partnership*, Superior Court, judicial district of Windham at Putnam, Docket No. 94-0049248-S.

accomplish said purpose." As evidence of this alleged conspiracy, and of the defendants' bad faith, the plaintiff claimed that, at the end of the negotiations between it and the defendants, agents of the defendants had given the plaintiff an ultimatum: either accept $250,000 as a full and final settlement on all claims to the complex and any personal property located therein, or the defendants would condemn the property and award the plaintiff the token sum of $1.

The plaintiff further alleged that, in order to exert pressure on it to accept the defendants' terms, the defendants had ordered the Windham tax collector, the defendant Linda Theriault, to levy an improper alias tax warrant on the personal property contained in the complex. The plaintiff also claimed that the defendants, prior to the condemnation, unlawfully had ordered officers of the Windham police department to prevent the plaintiff from exercising control over, and gaining access to, the complex and the personal property therein.

The record reveals the following additional relevant facts. On March 15, 1995, following the condemnation of its property, the plaintiff commenced this action against the defendants for damages pursuant to § 1983. In its initial complaint, the plaintiff claimed only that the defendants had condemned its property without just compensation.[4] The trial court, *Silbert, J.*, struck the plaintiff's initial complaint on the grounds that the plaintiff had not yet exhausted its available state remedies, and that, therefore, the plaintiff's claim was not ripe for adjudication. The plaintiff subsequently filed an amended revised complaint and a second amended revised complaint. Thereafter, the trial court, *Dunnell, J.*, struck the plaintiff's second amended revised complaint for essentially the same reasons that the initial

[4] Unlike the third amended revised complaint, the plaintiff's initial complaint did not contain a claim for damages under the state constitution.

complaint had been struck. Thereafter, the plaintiff filed the complaint that is the subject of this appeal.

In striking the plaintiff's complaint, the trial court, *Beach, J.*, began by noting the similarity between the plaintiff's current complaint, and the two previously stricken complaints. As justification for striking the plaintiff's claim under § 1983, the court, relying on the United States Supreme Court's decision in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), concluded that the plaintiff's claim was premature because the plaintiff had not yet exhausted all of its available state remedies. In conjunction with that determination, the court noted the line of United States Supreme Court cases that have held that "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (Internal quotation marks omitted.) Finally, the court noted its reluctance to "[expand] the concept of substantive due process, at least partly because it is a generally subjective standard that, at least at the stage of allegations, could run the gamut of tort law."

Turning to the plaintiff's claim under the state constitution, the court concluded that our decision in *Kelley Property Development, Inc.* v. *Lebanon*, 226 Conn. 314, 627 A.2d 909 (1993), was controlling, and that under the holding of that case, there "was no . . . cause of action, partly because there already existed means of redress which may afford some, even if not all, of the relief sought." The court acknowledged that our decision in *Binette* v. *Sabo*, supra, 244 Conn. 23, had, for some circumstances, created a private cause of action

for violations of article first, §§ 7 and 9, of the Connecticut constitution, but concluded that this case was governed by *Kelley Property Development, Inc.*, rather than by *Binette*.

On appeal to this court, the plaintiff claims that the trial court, *Beach, J.*, improperly struck its complaint. Specifically, the plaintiff contends that the trial court improperly concluded that the alleged conduct of the defendants did not give rise to a valid claim for damages either under § 1983 or under the state constitution. We affirm the judgment of the trial court in both respects.

I

STANDARD OF REVIEW

As an initial matter, we set forth the standard of review by which we judge the plaintiff's appeal. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the defendants' motions is plenary. See *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 232–33, 680 A.2d 127 (1996)." *Knight* v. *F. L. Roberts & Co.*, 241 Conn. 466, 470, 696 A.2d 1249 (1997). "In an appeal from the granting of a motion to strike, we must read the allegations of the complaint generously to sustain its viability, if possible; *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 68, 700 A.2d 655 (1997) . . . ." *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 18, A.2d (1999). We must, therefore, "take the facts to be those alleged in the complaint that has been stricken and . . . construe the complaint in the manner most favorable to sustaining its legal sufficiency. *Bohan* v. *Last*, 236 Conn. 670, 674, 674 A.2d 839 (1996); *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 696, 694 A.2d 788 (1997); *Waters* v. *Autuori*, 236 Conn. 820, 825, 676 A.2d 357 (1996)." (Internal quotation marks omitted.) *Jacoby* v.

Brinckerhoff, 250 Conn. 86, 89, 735 A.2d 347 (1999). Even under this deferential standard, however, neither of the plaintiff's claims may be sustained.

II

SECTION 1983 CLAIM

In the first count, the plaintiff alleged that the defendants' conduct in seizing and condemning the plaintiff's real and personal property was so arbitrary and capricious that it rises to the level of a violation of the plaintiff's federal constitutional right to substantive due process, and therefore supports an action for damages under § 1983. See footnote 1 of this opinion. We agree with the trial court that the plaintiff has not stated a legally viable claim as a matter of federal law.

Section 1983 permits a federal cause of action to be brought against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States] . . . ." To state a valid claim under § 1983, a plaintiff must establish: "(1) [that] the conduct complained of was committed by a person acting under color of state law; and (2) [that] this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).[5]

[5] Although § 1983 speaks of *persons* being "[deprived] of . . . rights, privileges, or immunities secured by the Constitution and laws," of the United States, it is well established that nonhuman legal entities, such as partnerships and corporations, have standing to assert a claim under § 1983. See *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 105, 110 S. Ct. 44, 107 L. Ed. 2d 420 (1989) (taxicab franchise); *Des Verynes* v. *Seekonk Water District*, 601 F.2d 9, 16 (1st Cir. 1979) (corporations); *Gordon* v. *Cartersville*, 522 F. Sup. 753, 758 (N.D. Ga. 1981) (partnerships).

The United States Supreme Court has recently reiterated that "in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). In this case, the deprivation alleged by the plaintiff is an impairment of its right to substantive due process, as guaranteed by the fourteenth amendment to the United States constitution.[6] In order, therefore, to determine the propriety of the trial court's striking of the plaintiff's § 1983 claim, we must examine the contours of the federal constitutional right[7] to substantive due process.

It is axiomatic that the due process clause not only guarantees fair procedures in any governmental deprivation of "life, liberty, or property," but also encompasses "a substantive sphere . . . barring certain government actions regardless of the fairness of the procedures used to implement them . . . ." (Citations omitted; internal quotation marks omitted.) Id., 840. This basic protection embodies the democratic principle that "the good sense of mankind has at last settled down to this: that [due process was] intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (Internal

[6] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." As with claims under § 1983, nonhuman legal entities are persons within the meaning of the due process clause. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 660 (1936).

[7] It is well settled that a claim under § 1983 must be based on an alleged violation of a *federal* constitutional or statutory right. *Gomez* v. *Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); see *California* v. *LaRue*, 409 U.S. 109, 110 n.1, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972). Therefore, the plaintiff's claim of a violation of its *state* constitutional right to substantive due process, as a matter of law, cannot form the basis for its suit under § 1983. We discuss the plaintiff's claim under the state constitution in part III of this opinion.

quotation marks omitted.) Id., 845, quoting *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 122, 126, 4 L. Ed. 559 (1819).

Despite the important role of substantive due process in securing our fundamental liberties, that guarantee "does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *County of Sacramento* v. *Lewis*, supra, 523 U.S. 848. Rather, substantive due process has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that "our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." (Internal quotation marks omitted.) *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Thus, substantive due process has been held to safeguard such intimate activities as marriage; *Loving* v. *Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); contraception; *Griswold* v. *Connecticut*, 381 U.S. 479, 481–82, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); education of children; *Meyer* v. *Nebraska*, 262 U.S. 390, 399–403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); and bodily integrity. *Rochin* v. *California*, 342 U.S. 165, 171–72, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

The plaintiff argues that the allegedly abusive conduct of the defendants in seizing and condemning its property falls into that protected realm as well. That argument is unpersuasive because it ignores two basic tenets of substantive due process jurisprudence. First, the governmental conduct at issue does not violate substantive due process unless it "shocks the conscience"; *County of Sacramento* v. *Lewis*, supra, 523 U.S. 846; and egregiously transcends the "decencies of civilized conduct." *Rochin* v. *California*, supra, 342 U.S. 173. The alleged actions of the defendants in this case fall

far short of meeting that exacting standard. Second, as the United States Supreme Court repeatedly has held, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (Internal quotation marks omitted.) *Albright* v. *Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). Because both the fourth and fifth amendments to the United States constitution provide explicit protection against the arbitrary seizure and condemnation of private property,[8] the plaintiff is precluded from redress under "the more generalized notion of substantive due process . . . ." (Internal quotation marks omitted.) Id. We discuss, in turn, each of these strands of the federal law of substantive due process.

A

The plaintiff claims that the alleged actions of the defendants were so arbitrary and oppressive that they violated its right to substantive due process. Even viewing the allegations contained in the plaintiff's complaint in a light most favorable to sustaining its validity, as we are bound to do considering the procedural posture of the case; *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 18; we find that the conduct of which the plaintiff complains does not meet the mandated constitutional standard of the kind of misuse of governmental authority that is encompassed within cognizable claims of the denial of substantive due process.

[8] The fourth amendment to the United States constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

The fifth amendment to the United States constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

Substantive due process is the embodiment of society's desire to "prevent government from abusing [its] power, or employing it as an instrument of oppression." (Internal quotation marks omitted.) *Collins* v. *Harker Heights*, 503 U.S. 115, 126, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). To that end, a claim of a violation of substantive due process must allege a "level of executive abuse of power . . . which shocks the conscience." *County of Sacramento* v. *Lewis*, supra, 523 U.S. 846. A salient example of such abuse of power may be found in the very case in which the standard was first enunciated. In *Rochin* v. *California*, supra, 342 U.S. 172, the United States Supreme Court held that the forced pumping of a suspect's stomach to retrieve evidence "shocked the conscience." As the court described it, "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." Id.

The court's recent decision in *County of Sacramento* v. *Lewis*, supra, 523 U.S. 833, further illustrates the extremity of government abuse that must be alleged in order to sustain a substantive due process claim. In that case, reckless indifference by a police officer during a high-speed chase resulted in the death of the appellees' decedent. In sustaining the trial court's grant of summary judgment in favor of the county of Sacramento, the United States Supreme Court held that "[r]egardless [of] whether [the police officer's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983." Id., 855.

The facts alleged in, and fairly provable under, the plaintiff's complaint in this case similarly fail to meet the standard for a violation of substantive due process. The plaintiff's claims of government abuse are threefold, namely, that: (1) the defendants engaged in deliberately bad faith negotiations for the sale of the complex; (2) the defendants induced the town tax collector to issue an improper alias tax warrant in order to exert pressure on the plaintiff; and (3) the defendants ordered the Windham police to deny the plaintiff access to the complex prior to the actual condemnation. As in the *County of Sacramento* case, these actions may form the basis for other valid legal claims. Indeed, the plaintiff has filed three other lawsuits[9] in order to obtain redress for its claimed injuries. The actions of the defendants as alleged in this case are, however, a far cry from the stomach pumping of *Rochin*, or the attempted regulation of personal decisions regarding marriage or contraception of *Loving* and *Griswold*. Similarly, the plaintiff's allegations do not resemble the type of oppressive governmental conduct that resulted in a death in the *County of Sacramento* case, and yet was held by the United States Supreme Court not to be actionable as a violation of substantive due process. In our view, the type of economic harm alleged in the plaintiff's complaint fails to rise to the conscience shocking level that the United States Supreme Court has set as the standard for violations of substantive due process.[10]

[9] The plaintiff has filed separate actions over the condemnation; *Northeast Connecticut Economic Alliance, Inc.* v. *ATC Partnership*, Superior Court, judicial district of Windham at Putnam, Docket No. 94-0049248-S; for conversion and replevin; *ATC Partnership* v. *Windham*, Superior Court, judicial district of Windham at Putnam, Docket No. 95-0049838-S; and over the improper tax liens. *Windham* v. *ATC Partnership*, Superior Court, judicial district of Windham at Putnam, Docket No. 96-0054331-S.

[10] The plaintiff's reliance on, inter alia, the Ninth Circuit Court of Appeals' decision in *Sinaloa Lake Owners Assn.* v. *Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), cert. denied, 494 U.S. 1016, 110 S. Ct. 1317, 108 L. Ed. 2d 493 (1990), is misplaced. Although the opinion in that case supports the plaintiff's

B

The plaintiff further argues that the trial court improperly concluded that the existence of an explicit source of constitutional protection against the type of government abuse alleged in this case forecloses the plaintiff's substantive due process claim. We disagree with the plaintiff.[11]

In *Graham* v. *Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the United States Supreme Court first held that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Although this rule has been the subject of some scholarly criticism,[12] the court has reaffirmed it three times since it decided *Graham*. See *County of Sacramento* v. *Lewis*, supra, 523 U.S. 842; *United States* v. *Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997); *Albright* v. *Oliver*, supra, 510 U.S. 273. The *Graham* doctrine,

claim, it was overruled by the Ninth Circuit in *Armendariz* v. *Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996), and, therefore, affords the plaintiff no assistance.

[11] The plaintiff claims, as a threshold matter, that we should decline to review this issue because it "amounts to an alternative ground upon which to affirm the judgment of the trial court . . . [that] was never raised in the trial court [and for which] the . . . defendants failed to file a preliminary statement of the issues . . . ." A careful review of the record reveals, however, that the trial court did, in fact, in part base its decision on the existence of "an explicit textual source of constitutional protection against a particular sort of government behavior," namely, the takings clause. Because our review of the legal questions presented by a motion to strike is plenary; *Knight* v. *F. L. Roberts & Co.*, supra, 241 Conn. 470; the trial court's reliance on this concept properly is before this court regardless of the defendants' failure to file a preliminary statement of issues.

[12] See, e.g., T. Massaro, "Reviving Hugo Black? The Court's 'Jot for Jot' Account of Substantive Due Process," 73 N.Y.U. L. Rev. 1086 (1998) (arguing that *Graham* rule erodes substantive due process protections).

which is premised on the court's " 'reluctan[ce] to expand the concept of substantive due process' "; *County of Sacramento* v. *Lewis*, supra, 842; is designed to ensure that "claim[s] [are] analyzed under the standard appropriate to that specific [constitutional] provision, not under the rubric of substantive due process." *United States* v. *Lanier*, supra, 272 n.7.[13]

In the present case, two specific constitutional provisions, the fourth and fifth amendments; see footnote 8 of this opinion; provide "explicit textual source[s] of constitutional protection" against the type of governmental misconduct alleged in the plaintiff's complaint. *Graham* v. *Connor*, supra, 490 U.S. 395. If the defendants' seizure of the plaintiff's property prior to condemnation was illegal, then it may be actionable under the fourth amendment; if the condemnation itself was improper, then it may be actionable under the takings clause. In any event, the facts of this case do not warrant our departure from the analytical framework set forth by the United States Supreme Court in *Graham*.[14]

[13] The plaintiff's reliance on *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993), and *Soldal* v. *Cook County*, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992), is misplaced. The former case involved procedural, rather than substantive, due process and hence is inapposite. *United States* v. *James Daniel Good Real Property*, supra, 48–52. In the latter case, the court merely held that the fourth amendment, and not the takings clause, was the proper source of explicit textual protection against the governmental wrong alleged by the plaintiffs. *Soldal* v. *Cook County*, supra, 61. Contrary to the plaintiff's argument, neither case holds that if an explicit constitutional provision is implicated by supposed government misconduct, a court nevertheless should analyze the misconduct through the lens of substantive due process.

[14] Similarly unavailing is the plaintiff's attempt to distinguish *County of Sacramento* v. *Lewis*, supra, 523 U.S. 833. Contrary to the plaintiff's contention that *County of Sacramento* departs from the *Graham* rule, the court in that case reached the substantive due process issue *only* because "[t]he Fourth Amendment covers only searches and seizures, neither of which took place here." (Internal quotation marks omitted.) Id., 843. By contrast, there is no question that the property at issue in this case was "seized" within the meaning of the fourth amendment.

C

In sum, not only is the government misconduct complained of hardly conscience shocking in a constitutional sense, but that misconduct has remedies grounded in two other explicit federal constitutional provisions. We, therefore, decline the plaintiff's invitation to recharacterize the alleged facts of this case as probative of a cognizable violation of a right to substantive due process. In so doing, we affirm the wisdom of the United States Supreme Court's warning against employing "[o]ur Constitution . . . to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U.S. 327, 332, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). The guarantee of substantive due process is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). In light of these considerations, we conclude that the trial court properly struck the plaintiff's § 1983 claim.

III

STATE CONSTITUTIONAL CLAIM

The plaintiff's alternate contention is that, even if federal law provides it no remedy, it has stated a valid claim under the state constitution. Although the plaintiff does not challenge directly the constitutional validity of the taking of its property through condemnation, it alleges that the conduct of the defendants, in anticipation of that taking, was so egregious that the defendants are liable for damages for their violation of the plaintiff's substantive due process rights under article first, § 8, of our state constitution.[15]

[15] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

The issue before us is framed by the two cases in which we have considered the viability of a constitutional tort claim under the state constitution. The plaintiff argues that its pleadings fall within the allegations sustained in *Binette* v. *Sabo*, supra, 244 Conn. 23, in which we recognized the validity of such a state constitutional claim under article first, §§ 7 and 9, of our state constitution in the context of allegations of an egregiously unreasonable search and seizure.[16] The defendants argue, to the contrary, that the plaintiff's claim for relief is precluded by *Kelley Property Development, Inc.* v. *Lebanon*, supra, 226 Conn. 314, in which we declined to recognize such a claim under article first, § 8, in the context of allegations of an intentional and arbitrary misuse of zoning authority to obstruct a real estate development project. The trial court held that *Kelley Property Development, Inc.*, was the controlling precedent under the circumstances of this case. We agree.

In *Binette*, we declined to create an all-encompassing damages action for any and all alleged violations of state constitutional provisions. We held, instead, that whether such a cause of action should be recognized would be determined on a case-by-case basis. *Binette* v. *Sabo*, supra, 244 Conn. 48. Accordingly, we identified the factors to be considered as including the following: "the nature of the constitutional provision at issue; the nature of the purported unconstitutional conduct; the nature of the harm; separation of powers considerations and the other factors articulated in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390–97, 91 S. Ct. 1999, 29 L. Ed. 2d

[16] We analogized the constitutional tort action that we were recognizing to that described by the United States Supreme Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390–97, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). *Binette* v. *Sabo*, supra, 244 Conn. 45–48.

619 (1971)] and its progeny; the concerns expressed in *Kelley Property Development, Inc.*; and any other pertinent factors brought to light by future litigation." *Binette* v. *Sabo*, supra, 48. Among the relevant concerns expressed in *Kelley Property Development, Inc.*, was the undesirable prospect of conflict between statutorily provided administrative remedies and judicially created tort remedies arising out of the same controversy. *Kelley Property Development, Inc.* v. *Lebanon*, supra, 226 Conn. 339–40.

The plaintiff advances three reasons in support of its claim that its cause of action should be governed by *Binette* and not by *Kelley Property Development, Inc.* First, the plaintiff contends that, because it has alleged an excessive use of force by police officials, the conduct at issue resembles that alleged in *Binette*. Second, it maintains that existing statutory remedies for condemnation and common-law remedies for replevin or conversion are constitutionally deficient because such remedies provide no relief for the allegedly malicious and abusive manner in which the defendants exercised their authority. Third, it asserts that the police officers and elected officials who are the defendants in this case should be held to a higher constitutional standard of conduct than the standard applied to the *Kelley Property Development, Inc.*, defendants, who were local volunteer members of a planning and zoning commission. We are not persuaded by any of these arguments.

With respect to the nature of the police conduct at issue, the plaintiff's complaint alleges that police officials intimidated it from exercising its lawful rights over both its personal and real property. Unlike the allegations in *Binette*, however, the allegations in the plaintiff's complaint do not assert that there was any physical confrontation between it and the police, or that the

police, without a warrant, entered into a private home.[17] The plaintiff's complaint does not purport to state any claim for an unconstitutional search and seizure under article first, §§ 7 and 9, of the state constitution. All that the plaintiff alleges is that, pursuant to an alias tax warrant for delinquent property taxes, the validity of which the plaintiff disputes, the defendants posted police officials at the plaintiff's business complex in order to preclude the plaintiff from having access to its property. That allegation is a far cry from the alleged egregious police misconduct that we held to be actionable in *Binette*. A municipality is not subject to constitutional reproach for a violation of the right to substantive due process simply because a taxpayer disputes the validity of the municipality's recourse to statutorily authorized mechanisms for the collection of local taxes.

With respect to the availability of alternate remedies, the plaintiff contends that existing statutory and common-law remedies do not provide adequate constitutional protection for the impairment of its right to substantive due process that arises from the wilful and intentional abuse of governmental authority to condemn property for public purposes. Specifically, the plaintiff contends that nonconstitutional remedies do not provide it relief from the defendants' bad faith negotiations that, according to the plaintiff's allegations, were intended to coerce the plaintiff into selling its property to the defendants at a fraction of its value. This contention is, however, indistinguishable from that which we found insufficient to warrant constitutional protection in *Kelley Property Development, Inc.* There,

[17] The plaintiffs in *Binette* alleged that police officers of the city of Torrington had entered the plaintiffs' home without a warrant, unlawfully had threatened one of the plaintiffs with arrest and imprisonment, and had subjected both of the plaintiffs to repeated physical abuse during the course of affecting their arrest. *Binette* v. *Sabo*, supra, 244 Conn. 26.

too, as the dissenting opinion of Justice Borden highlighted, the plaintiff alleged that the defendants intentionally, knowingly and arbitrarily had abused their governmental authority to impair the plaintiff's ability to make proper economic use of its property. *Kelley Property Development, Inc.* v. *Lebanon*, supra, 226 Conn. 346–47. In accordance with *Kelley Property Development, Inc.*, the plaintiff's contention cannot be sustained in this case.

Finally, the plaintiff urges us to hold that, because the defendants are police officials and elected public officers, they should be held to a higher standard of constitutional accountability for alleged impairment of the plaintiff's right to substantive due process than we held to be appropriate for the citizen planning and zoning commission members who were the defendants in *Kelley Property Development, Inc.* Although the defendants' status as volunteers was a relevant factor in that case, it was not dispositive there. Similarly, the governmental status of the defendants is not dispositive in the present case.

At the end of the day, the single most important consideration in this case is that the plaintiff's substantive due process claim is premised entirely on alleged harm to its economic interests in the development of real and personal property. Federal case law has not extended a *Bivens* remedy for such a claim.[18] Under the circumstances, the remedies that are afforded to the plaintiff by the constitutional and statutory law of condemnation, the constitutional law of search and seizure and the common law of replevin and conversion are sufficiently compensatory to obviate the need for

[18] The plaintiff again relies on *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). As discussed previously; see footnote 13 of this opinion; that case is inapposite because it addresses a claim of procedural due process, rather than of substantive due process.

judicial recognition of a freestanding tort claim under article first, § 8, of our state constitution.

IV

CONCLUSION

We conclude that the trial court properly determined that the allegations contained in the plaintiff's third amended revised complaint are insufficient to state a cause of action either under § 1983 or under the due process clause of the Connecticut constitution. Our decision does not leave the plaintiff remediless. It remains free to pursue other avenues for relief that are better suited for its claim of improprieties in the seizure and condemnation of its property.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JUAN PARRA
(SC 16030)

McDonald, C. J., and Berdon, Norcott, Katz and Sullivan, Js.

Syllabus

The defendant, who had been convicted in 1991 of the crime of manslaughter in the second degree with a motor vehicle on a plea of nolo contendere, filed a motion in 1997 to vacate the judgment and to withdraw his plea, claiming that the trial court had not informed him of the possible consequences that his plea would have on his immigration status. The trial court denied the motion on the ground that the plaintiff had failed to file that motion within three years of the date of the acceptance of the plea as required by statute (§ 54-1j as amended by P.A. 97-256, § 6), which took effect October 1, 1997, and the defendant appealed. The statute formerly had provided that the motion could be filed at any time. *Held* that the trial court properly determined that P.A. 97-256, § 6, applied retroactively and properly denied the defendant's motion; although the public act is ambiguous on its face with respect to whether it is to be applied retroactively, the legislative history clearly and unequivocally demonstrated that the legislature intended to apply it retroactively.

(*One justice dissenting*)

Argued September 23—officially released December 14, 1999

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 16173

ATC PARTNERSHIP

V.

TOWN OF WINDHAM ET AL. : JANUARY 19, 2000

ORDER

THE MOTION OF THE PLAINTIFF, FILED DECEMBER 20,1999, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED **DENIED**.

BY THE COURT,

Francis DeLuca

CHIEF CLERK

NOTICE SENT: JANUARY 20, 2000
WEINSTEIN & WISSER, P.C.
HOWD & LUDORF
LISA SILVESTRI
PETER D. HIRSCHL
RICHARD S. CODY
CLERK, MERIDEN J.D. (CV95-0248230S)
HON. ROBERT E. BEACH, JR.
RJD

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Fourteenth Amendment to the United States Constitution (Section 1):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized."